PRESS STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
APPROVING IN PART, CONCURRING IN PART, DISSENTING IN PART

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Seven years ago this month, Congress enacted a sweeping reform of our nation's telecommunications laws. In doing so, it sought to promote competition in all telecommunications markets and to replace the heritage of monopoly with the vitality of competition. Provisions to open the local markets to competition are at the heart of this Congressional framework. The Act contemplates three modes of competitive entry into the local market – construction of new networks, use of unbundled elements of the incumbent's network, and resale. The competition envisioned in the legislation is now, and only now, becoming a reality. Today, because of the vision of Congress and the hard work of American entrepreneurs across the country, there are 20 million competitive lines serving consumers, and the number continues to grow in spite of the severe economic downtown that the telecommunications industries, and the nation, have suffered. This Triennial Review offered us the opportunity to encourage this competition and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers."

In some ways, today's action advances that mandate. We preserve voice competition in the local markets and we allow it to grow. We accord the states an enhanced role in making the granular determinations about where the rules of the game may need to be changed and where they should be maintained in order to foster competition. One month ago, these gains were not expected.

In other and equally important ways, however, we fail our charge. Some competitive strategies are harmed by today's decision and, I believe worst of all, we are playing fast and loose with the country's broadband future, denying it the competitive air it needs to breathe in order to flourish. Consumers and the Internet itself may well suffer.

Today's item is not the one that I would have written had I been given *carte blanche*. Each of my colleagues could make the same statement. I have agreed to join certain decisions that are not my preferred outcome in an effort to find compromise and to avoid even more damage to the competitive landscape. I appreciate the willingness of my colleagues to engage in these discussions to find common ground. There are, however, aspects of this Order with which I cannot agree. As I reviewed the decisions we make today, I have tried always to keep in mind that setting competition policy is the exclusive jurisdiction of Congress. I have done my utmost to remain faithful to the public interest and to the competitive framework that Congress adopted in the 1996 Act. Where I am unable to square a decision with the statutory directives, I am compelled to dissent.

Permit me to highlight a few of the most important issues.

On the positive side, in the face of intense pressure for the Commission to make broad nationwide findings on impairment -- findings that would have doomed the future of unbundled elements such as switching -- we have instead managed to cobble together a majority for a more reasonable process to conduct a granular analysis that takes into account geographic and customer variation in different markets. We have recognized that the States have a significant role to play in our unbundling determinations. We have understood in many parts of this Order that the path to success is not through preemption of the role of the States, but through cooperation with the States. State Commissions with closer proximity to the markets are often best positioned to make the fact-intensive determinations about impairments faced by competitors in their local markets. I am therefore pleased with our decision that States should have an active part in conducting the granular analysis necessary to determine whether and where network elements such as switching should be available as unbundled network elements.

On transport, I believe the item is significantly improved from where it might have been. Dark fiber remains on the list of network elements; limitations on high-capacity transport were done in a manner that was responsive to the facilities-based competitors' concerns; and transport is not removed without a specific finding on a route, rather than based on some notion of contestability in the market.

There are aspects of this Order that are certainly not my preferred approach, but which I have had to accept in order to reach compromise. In particular, there is the decision to eliminate access to only part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. I believe that line sharing has made a contribution to the competitive landscape. Instead of recognizing this contribution and encouraging it, we provide today only an extended transition period to allow competitors to purchase the entire loop facility as a network element, or to pair with a voice provider, to offer the full range of services to a customer.

Finally, there are parts of this Order with which I strongly disagree. Most importantly, I am troubled that we are undermining competition, particularly in the broadband market, by limiting -- on a nationwide basis in all markets for all customers – competitors' access to broadband loop facilities whenever an incumbent deploys a mixed fiber/copper loop. That means that as incumbents deploy fiber anywhere in their loop plant -- a step carriers have been taking in any event over the past years to reduce operating expenses -- they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, this Commission has chosen in this instance to perpetuate the bottleneck, and it does so on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts. To make matters even worse, in some markets such as the small and medium business market, there may not be any competitive alternatives if competitors cannot get access to loop facilities.

I fear that this decision may well result in higher prices for consumers and put us on the road to re-monopolization of the local broadband market. Additionally, I worry about the negative impact of this decision on facilities-based carriers which are practicing the kind of competition we all talk about encouraging. They face enough challenges in these difficult economic times without having us add to their burdens.

A word to the wise: Other decisions are hurtling towards us. As harmful as this decision is, it may not be the last battle this year in the headlong rush to deregulate broadband. In a few short months, maybe sooner, we will consider whether to deregulate broadband entirely by removing core communications services from the statutory frameworks established by Congress. Opponents of this change argue that this is substituting our own judgment for that of the law, and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another. We will also consider whether large incumbent carriers providing broadband services should henceforth be regulated as non-dominant, or lacking market power, rather than dominant and exercising market power. In light of our goals of establishing certainty and stability, I hope we would proclaim today that we will not overturn these unbundling obligations in those proceedings over the next few short months. But I caution that it could indeed happen.

It is no secret that some parties urged us to go much further today toward a wholesale upending of the current telecommunications landscape just when competition was beginning to take hold. Instead of preserving, protecting and defending competition, their idea seemed to be tearing away the infrastructure that undergirds that competition. Today's decision is not just a big-ticket item for telephone companies on one side or another of some admittedly arcane issues. It affects us all. It's next month's phone bill, but it's also the next generation's broadband and the future of the Internet. It will deeply affect our country's future. We've got to make good, smart decisions. On broadband, at least, we haven't done this.

I am also worried about process here. Seven years ago, when Congress passed the landmark Telecommunications Act, the Commission implemented its regulatory directives in a bipartisan fashion by unanimous vote, reaching consensus under extremely short statutory deadlines. Today, by contrast, we adopt one of our most important decisions to date by a split decision plagued by shifting pluralities. I am disappointed that we were not able to reach compromise on all of the questions and issue a unanimous decision as previous Commissions were often able to accomplish. Perhaps, given the different philosophical and regulatory approaches which exist among us, that just wasn't in the cards here. Nevertheless, I believe we have some lessons to learn about smoothing the process within, exchanging ideas and paper earlier on, and making sure we have enough time to reach and hammer out final agreements. I also believe that the constraints placed upon Commissioners by laws that forbid more than two of us from meeting together, talking together and reaching agreement together hobble the regulatory process and retard our ability to tackle complex proceedings like this one. I don't know of any other institution that is forced to operate this way. Maybe the ability to manage our discussions differently would not have rescued this item, but I do think it could make a

difference going forward. And we have a lot of work to do going forward. One item that requires our immediate attention is performance metrics. Ideally, a decision on this would have preceded today's decision, so that incumbents and competitors alike would know what is expected of them regarding the now fewer regulatory requirements they must meet.

In light of the positive and negative parts of today's decision, I vote to approve in part, concur in part, and dissent in part. Although the bottom lines have been decided, the devil is more often than not in the details. I am unable to fully sign on to decisions without reservations until there is a final written product. As we finalize the draft in the coming days, I hope all of the agency's resources will be working towards implementing the majority opinion on all aspects of the Order so that it can withstand the inevitable litigation that is sure to follow. If we do not dedicate all our resources to perfecting this Order, we will be vulnerable to the accusation that we are throwing up our hands and expecting the courts to step in. That's not good government.

The FCC Team has an uncommonly high share of bright, talented and dedicated people - among the country's best, inside or outside of government. I want to thank Bill Maher and his team for their tireless efforts and for the dedication exhibited by the Wireline Competition Bureau staff throughout this proceeding. I'd like to thank each member of the team individually because I know how hard they worked and how late they burned the midnight oil. Most of all, I want to thank my Senior Legal Adviser, Jordan Goldstein, for the endless hours, the encyclopedic knowledge and invariably good judgment he brings to all these issues. For his work here, he deserves both a Silver Star and a Purple Heart.